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# **Promotion Checkoffs, Why So Controversial? The Evolution of Generic Advertising Battles**

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# **Promotion Checkoffs, Why So Controversial? The Evolution of Generic Advertising Battles**

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## **Abstract**

In June of 2001, the US Supreme Court ruled that an industry-financed promotion program for mushrooms violated the First Amendment. Since the 1980s, generic advertising programs for dozens of farm commodities have been entangled in a great deal of litigation. This paper looks at the history of the generic advertising policies and why the litigation arose when it did. Although some have argued that the litigation is the result of either unbridled lawyers or free-riding farmers, the author argues that the current round of litigation is simply an inevitable outgrowth of fairly recent U.S. Supreme Court rulings on commercial speech. The author concludes by predicting an increase in generic advertising litigation that will be based upon the degree of collectivization in an industry.

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## **Promotion Checkoffs, Why So Controversial? The Evolution of Generic Advertising Battles**

In 1997 the Supreme Court ruled in *Glickman v. Wileman* that federally mandated generic advertising for California peaches, plums and nectarines does not violate the First Amendment. With that ruling, this last decade's bout of commodity advertising litigation initially appeared to be coming to an end. Economists and other analysts will no doubt try to enumerate the cost of these lengthy challenges, but perhaps the biggest cost is immeasurable: the cost arising from the ill will engendered along both sides of this debate. Just prior to the ruling, Mark Houston, president of the California Kiwifruit Administrative Committee, summed up the views of many growers when he said, "This issue needs to be cleared up and not become a full employment act for attorneys. . . . The controversy has pitted farmer against farmer at a time when it is getting tougher and tougher to farm." Recently, however, the extent of the *Glickman* ruling's impact on generic advertising programs has been brought into question with a June 2001 US Supreme Court ruling that a mushroom promotion program violates the First Amendment (*U.S. v. United Foods*). Although many are speculating as to what this decision means in light of the earlier *Glickman* decision, given the acrimonious history of the battles over industry-funded promotion programs, one thing seems clear; the litigation can only increase. In order to understand where that litigation may be heading, it is important to understand how farmers arrived here. This paper examines the history of these controversial marketing programs.<sup>1</sup>

Just prior to the Supreme Court's ruling in *Glickman*, Len Richardson, editor of the trade journal *California Farmer*, and a supporter of the marketing orders for generic advertising, referred to what he saw as the root of the controversy, "Marketing orders, like farm cooperatives, were developed out of the need for market unity and common values – not money grubbing."

His column was the target of California Attorney Brian Leighton (representing dozens of litigants in generic advertising cases), who questioned the premise that “farmers and shippers are so inefficient – or dumb – that without government ‘assistance’ they would not know how to market their product.” Such divergent viewpoints and the ongoing litigation provide strong evidence of the controversy surrounding the advertising programs. Even so, there has been very little written on these controversial battles and how they came about.<sup>2</sup>

This paper focuses on generic advertising battles that grew out of the 1937 Agricultural Marketing and Agreement Act and the subsequent state acts that established the federal and state marketing orders. Briefly, marketing orders provide farmers of a particular commodity with a method of regulating the marketing of their products under the auspices of the U.S. Secretary of Agriculture (for a federal order) or the State Secretary (for a state order). Under the orders, growers in an industry are compelled to participate jointly in certain aspects of the marketing of the crop. For example, a marketing order for generic advertising compels all growers under the order to jointly contribute funds for industry advertising. The generic advertising component of marketing orders is merely one of many regulatory attempts to alleviate what is termed “the farm problem”, though it has become in recent years the most controversial of these regulations. This paper shows that the arguments symbolized in *Glickman* cannot readily be explained away by the conventional wisdom that these suits are the result of “money grubbing” free riders, free-market extremists or unbridled lawyers. Whether either side of the battle was aware of it or not, the issues grew out of a process – a long, evolutionary process of economics, legislation, and litigation – that has been obscured behind the invective. This paper reviews the history of marketing orders and, especially, the battles over marketing orders for generic advertising and shows that the present-day First Amendment challenges are a logical *and inevitable* extension of

Supreme Court decisions in unrelated cases involving commercial speech and association rights.<sup>3</sup>

### **Solving the Farm Problem through Farmers Associations**

It is true that the Agricultural Marketing Agreement Act of 1937, like its precursors the Agricultural Adjustment Acts of 1933 and 1935 (amended), grew out of the suffering of the Great Depression, but these acts are extensions of earlier voluntary attempts by farmers to control the farm problem.

Generally speaking, the farm problem is a combination of several idiosyncrasies in agricultural production. First, there is the inherent production instability from exogenous production shocks that are peculiar to agriculture (e.g., weather, diseases, pests). Relatedly, because demand is fairly stable and inflexible, but supplies are highly variable, there is a great deal of price fluctuation from year to year. As succinctly put by Chief Justice Rehnquist in oral arguments for the *Glickman* case, “If there’s a good crop, the prices are low, and if the prices are good, there’s virtually no crop. It’s a totally different situation from most other kinds of marketed goods.” Further, the geographic distance between rural producers and urban consumers has traditionally placed farmers at the mercy of marketing middlemen. Combine these factors with the excessive expansion of production capacity after the First and Second World Wars, and one begins to understand the problem.<sup>4</sup>

Because of the difficulties in adjusting agricultural production, the agricultural sector rides a roller coaster of booms and busts much more than the industrial sector, which can more easily control its day-to-day production levels. Early attempts to gain some control over agricultural production and marketing problems were seen in voluntary cooperative movements (like those of the Grangers and the Farmers’ Alliance in the mid-1800s) that were based upon

English Rochdale principles of nonprofit collectives. A cooperative, by combining the production of its members, was in a better bargaining position with marketing middlemen. Further, the larger the cooperative, the greater the control over the production swings that gave rise to volatile prices. Whether causal or correlative, the burgeoning cooperative movement coincided with an increase in relative U.S. farm incomes beginning around 1889. Nevertheless, these early, nonstock cooperatives, while politically appealing due to their grass-roots, self-help ideals, were constrained in their ability to grow and venture into marketing activities because their capital structure did not allow for the raising of equity. While today this would seem to be an oversight, such a nonstock structure was, in fact, desired by members who sought to distinguish their cooperative enterprises from other corporate forms that were seen as anathema to most farmers and many lawmakers.<sup>5</sup>

Cooperative idealism and political necessities notwithstanding, in order to raise equity so as to expand the cooperative and gain greater control over the marketing of the harvest, some cooperatives at the turn of the century began experimenting with different capital structures. Unlike their nonstock counterparts, the capital-stock cooperatives of the early 1900s, had to walk a fine line between cooperatives and corporations in order to avoid antitrust litigation. The earliest successes were California cooperatives for walnuts, almonds, peaches, table grapes and raisins who, in the words of Woeste, “all preached what was becoming the hallmark of California-style cooperation: monopoly control over the crop.”<sup>6</sup>

While these cooperative farmers may have seen their association as necessary to solving the farm problem, many Americans (and especially the marketing middlemen) saw these cooperatives as little different from other trusts. In some ways, the cooperative movement added a new wrinkle to the farm problem it was attempting to overcome; namely, greater production

control leads to greater scrutiny. Because a small cooperative is little more effective in dampening price volatility than an individual farmer, the effectiveness of a cooperative could only be strengthened with greater and greater production control; however, a large cooperative attracted a great deal of political and judicial inquiry.

Nevertheless, it was becoming apparent that any solution to the farm problem necessitated granting farmers greater control over the production and marketing of their goods. In his 1913 inaugural address, Woodrow Wilson took the opportunity to point out that the nation's farm policy, "never yet given the efficiency of great business undertakings," would have a new focus under his administration. The Clayton Act of 1914 exempted nonstock agricultural associations from antitrust laws, but because nonstock cooperatives (by their nature) were constrained in their ability to raise capital, the law had little effect on the new California-style cooperatives. Farm prices in the United States fell sharply during the 1920/21 crop year and continued to fall for most of the 1920s. As farm income fell, momentum grew among farm lobbies to seek expanded antitrust protection for stock cooperatives, as well. The Capper-Volstead Act of 1922 extended the Clayton Act's antitrust exemptions to all producer cooperatives, but still prevented cooperatives from engaging in predatory market conduct to exclude competition.<sup>7</sup>

Because most cooperatives have open memberships, there is always the threat of deviation. If the marketing activities of the cooperative cause prices to become very high, there is an incentive for an individual producer-member to deviate and sell his or her production on the open market. This is the problem facing any cartel, legal or otherwise, unless members are compelled to remain within the cartel. The success of the California Associated Raisin Company (Sun-Maid) in the 1910s and 1920s, for example, resulted from the cooperative's near monopoly



of the California raisin market (and the often heavy-handed tactics cooperative members used to recruit and retain growers). However, the Sun-Maid cooperative of those years was the exception rather than the rule, and the Capper-Volstead Act's provisions against restraint of trade made such a near monopoly virtually impossible. Thus, while the Capper-Volstead Act might have been initially praised as providing some solution to the farm problem, the limitations of cooperatives in (legally) alleviating over production remained as long as cooperatives were prevented from exercising near monopoly control over production or marketing.<sup>8</sup>

In the three years from 1929 to 1932, the farm commodities price index fell by 56 percent and net farm income fell by 70 percent. In an attempt to help themselves, some farm groups and cooperatives instituted commodity marketing programs using voluntarily collected producer funds. However, for homogeneous commodities, there is as little incentive for a cooperative lacking a great deal of market power to engage in marketing activities as there is for an individual producer. This is because other producers can take advantage of the increased prices resulting from the marketing activity without incurring any additional cost. Not surprisingly, the voluntary programs failed as many producers chose to remain outside the programs, thus enabling these outsiders to “free ride” on the efforts of those producers adhering to the voluntary marketing programs. Federal and state lawmakers responded to the growing discontent among farmers with a sequence of acts enabling the development of “marketing orders” designed to restore market stability.<sup>9</sup>

The farm legislation that created federal and state marketing orders is often seen as merely a reaction to the dire economic consequences of the Great Depression. For example, during the Supreme Court testimony for the *Glickman* case, Justice Scalia referred to marketing orders for generic advertising as “time-warped” out of that era, “a remnant of the National

Recovery Act.” However, the 1937 legislation was not merely an attempt to alleviate a problem created by the Depression. The problem had always existed; it was simply that the Depression made it more obvious. In fact, the earliest New Deal “solution” to the farm problem of granting more credit through the Reconstruction Finance Corporation and the Farm Act of 1932, exacerbated the farm problem, as an increase in credit led to more production that, in turn, led to lower farm prices. As Keller points out, “The Depression made it evident that the great need was not easy credit but higher prices.” The Clayton and Capper Volstead Acts provided some degree of control over the farm problem, but when the Depression came, their limitations became more pronounced. As Woeste illustrates, in the view of the majority of farmers and their legislative allies, “the free-rider problem could not be solved unless the state mandated universal participation.”<sup>10</sup>

The Depression notwithstanding, the courts’ initially remained antitrust and anti-regulatory when it came to government price or production programs. Also, while farmers lobbied for government controls that would increase farm prices, handlers and processors naturally resisted any programs that would raise the prices they paid to farmers. Because of this, any expansion of powers allowing the regulation of prices and production were highly scrutinized. In order to provide farmers greater control over the marketing of their goods, the Agricultural Adjustment Act of 1933 gave the Secretary of Agriculture the power to enter into marketing agreements with growers, and to issue licenses granting the licensee permission to handle agricultural commodities. Through the act, the Secretary was also granted the ability to impose production restraints to reduce commodity surpluses in order to increase farmers’ purchasing power to that which farmers had enjoyed in the more prosperous years of 1909 to 1914 (“purchasing power parity”). However, the 1933 act was vaguely worded, granting rather

broad legislative and taxing powers to a member of the Executive branch (the Secretary) without clearly delineating the specifics for these powers. Thus, in 1935, when the U.S. Supreme Court ruled that similar portions of other New Deal legislation were unconstitutional (*Panama Refining Co. v. Ryan* and *Schechter v. United States*), Congress amended the 1933 act.<sup>11</sup>

Even with its amendments, the Agricultural Adjustment Act of 1935 had only a short life. Although Congress tried to create an act that would be more amenable to the courts, in 1936 the Supreme Court (*United States v. Butler*) balked at the broad processing tax provisions of the act, ruling that since only Congress or the states may tax, giving these powers to the Secretary violated the Tenth Amendment. Later that year, a Massachusetts District Court (*United States v. David Buthick Co.*) ruled the tax and marketing order provisions were inseparable and, therefore, the validity of the entire act was dubious. In an attempt to satisfy the courts, Congress passed the 1937 Agricultural Marketing and Agreement Act. In this act, the vagaries of the previous acts were clarified so that the specific powers of the Secretary with regard to the creation, terms and conditions, administration, enforcement, and termination of marketing orders and agreements were now sufficiently delineated. Likewise, the tax, or assessment provisions were narrowed so as to provide for the costs incurred solely for the furtherance of the goals of the act.<sup>12</sup>

Simply, the 1937 Act provides for four types of regulatory actions: *i*) restrictions on the quantity of a commodity that can be sold, either through marketing allotments or reserve pools, *ii*) limits on the grade, size, or quality of the commodity, *iii*) regulation of packaging and container sizes, and *iv*) some limited generic promotion and advertising allowances (most notably for milk promotion, with broader provisions for generic advertising and promotion coming with later amendments, as discussed below). Marketing orders must be for specific commodities and in as small a region as possible to further the objectives of the order. A federal

marketing order can only be set up by the Secretary provided that a two-thirds majority of affected growers vote in favor of one, and the Secretary must nullify the order upon a simple majority vote by the growers to do so.<sup>13</sup>

## **Litigation**

### *United States v. Rock Royal CO-OP (1939)*

The first test of the 1937 act came on October 27, 1938 when the United States filed a complaint against several milk processors for failing to pay their assessments under Milk Order No. 27. The processors claimed the Order had been improperly adopted and that both the Milk Order and the act were unconstitutional infringements on their due process rights (Fifth Amendment), on rights reserved only for the states (Tenth Amendment), and on the processors' property rights (Fourteenth Amendment). The District Court agreed and the government appealed to the Supreme Court, which heard the case in April of 1939 (*United States v. Rock Royal CO-OP, Inc.*).<sup>14</sup>

Taking their cues from the 1936 *Butler* decision, the milk processors made three main arguments. First, the defendants argued that their Fifth Amendment rights had been violated because the broad, price-fixing powers given to the Secretary violated due process laws. Second, the defendants argued that the Tenth Amendment had been violated since any attempt by the federal government at fixing the price of milk before any interstate commerce had commenced interceded such rights reserved to the states. Third, the defendants argued that the delegation of authority granted *i)* to the Secretary to establish marketing areas, *ii)* to producers to approve a marketing order without an agreement of the processors, and *iii)* to cooperatives to cast votes of producer patrons (so called "bloc voting") went against the Court's rulings in the *Schechter* case.

The Supreme Court rejected these arguments upholding the 1937 Act and the Order in a 5 to 4 decision. For the first two of these three challenges, the Supreme Court held that the interstate commerce clause granted Congress the authority to regulate economic sectors, and that the timing of the regulation does not supersede such authority. Writing for the majority, Justice Reed affirmed, “Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependant on them.” For the third challenge, the Court found that, unlike the previous acts of 1933 and 1935, the provisions of the 1937 act with regard to delegation of authority were sufficiently narrow. Further, since Congress had the power to authorize regulatory powers, as it deemed necessary, there was nothing invalid about the cooperative bloc-voting scheme either.<sup>15</sup>

The importance of the *Rock Royal* decision can hardly be underestimated. By upholding the 1937 Act, the Supreme Court had established the right of producers in dairy, fruit and vegetable markets to vote themselves into or out of a regulated industry. True, the years that followed would still be filled with litigation involving marketing orders, but most of these complaints were along procedural grounds such as the timing or calling of board elections and voting (e.g. *U.S. v. Mills* in 1963, *Freeman v. Hygeria Dairy Co.* in 1964, *Consolidated-Tomoka Land Co. v. Butz* in 1974, *Sequoia Orange Co. v. Yeutter* in 1992, *Cecelia Packing v. USDA* in 1993) or the Secretary’s handling of various suspensions (e.g. *Carnation Co. v. Butz* in 1974, *Abbotts Dairies v. Butz* in 1975) and not about the constitutional validity of the programs. The strength of the Supreme Court decision in *Rock Royal* can be seen in the fact that there would be no challenge to the constitutionality of the 1937 Act for nearly fifty years.<sup>16</sup>

**Advertising, Abood, and Central Hudson**

In the decades following the implementation of the 1937 Act, marketing orders and agreements had become facts of life in U.S. agriculture. Thus it is hardly surprising that few farmers would take notice of the relatedness of three disjoint events that occurred over a period of twenty years nor how these three seemingly unrelated events would coalesce to create the biggest challenge to the 1937 act since *Rock Royal*.

*Event #1: 1954 Advertising Amendment to the Act*

In 1954, Congress amended the 1937 act so as to authorize the Secretary to establish “marketing development projects,” including advertising and promotion for a broad range of commodities, that would further the goals of the original act. With the exception of some minor provisions for milk promotion, generic advertising had been left out of the original 1937 act because the USDA had concerns that advertising just changed market share from one commodity to another. By the 1950s, however, the government was purchasing a good deal of excess supply to maintain parity prices. Stimulating demand through advertising, it was hoped, would help increase farm prices while relieving pressure for governmental purchases of excess stocks. Viewed in this light, generic advertising just added a demand instrument to the government’s toolbox of supply controls.<sup>17</sup>

Although the USDA had tempered its view of generic advertising, the economic rationale for such a marketing practice had not changed since the days of the Depression. For farmers growing homogeneous products, in the absence of a significant market presence, there is no incentive for either an individual producer or a cooperative to engage in advertising because other producers of the same commodity may then free ride upon this advertising. An individual

producer's or a cooperative's choice is twofold: either advertise in the hopes of establishing a distinguishable brand or refrain from advertising altogether. More often than not, because agricultural commodities are indistinguishable, the latter decision is made. Thus, a sub-optimal level of advertising is expended in an industry, and, even though every producer would benefit from advertising, no individual producer wishes to be the one to undertake the expense. A marketing order for generic advertising solves this problem by compelling every producer in an industry to support the program. The stipulations of marketing orders for generic advertising are that advertising must truly be of a generic nature so as not to benefit some growers over others, and that the assessed money may not be used to promote political or ideological viewpoints.

*Event #2: Abood v. Detroit Board of Education (1977)*

The second event had nothing to do with agriculture. According to a provision of a collective bargaining agreement between the Detroit Federation of Teachers (Union) and the Detroit Board of Education, any teacher who had not become a Union member within 60 days of hire had to pay a service charge equal to the regular Union dues. D. Louis Abood and some other Detroit teachers objected to the notion of collective bargaining in the public sector, and, therefore, had ideological reasons for not associating with a Union. Further, these teachers objected to the service charges because the charges were being used, in part, for political endorsements. Beginning in a Michigan State Court in 1969, the case was finally decided by the U.S. Supreme Court in May 1977.<sup>18</sup>

The Supreme Court ruled that if the government deems labor relations to be important in maintaining a healthy economy, then compelling payment for collective bargaining is valid even if some members disagree with collective bargaining. However, the Union did not have a right

to compel speech through Union dues or service charges if an individual disagreed with an ideological viewpoint unrelated to collective bargaining, contract administration or grievance adjustments. The Court ruled that, although Mr. Abood and the other teachers were not being prohibited from expressing their opinions, freedom of speech includes the right not to be compelled to speak. The Union could only use a dissenter's money in a way that was germane to the purpose of the compelled association, e.g. the collective bargaining. Thus, an *Abood* test merely requires that compelled assessments be relevant to the goals of the government interest and may not be used to fund ideological or political activities.

*Event #3: Central Hudson Gas & Electric v. Public Service Commission of New York (1980)*

In 1973, in order to temper the demand on shrinking fuel stocks, the Public Service Commission of New York ordered electric utilities in the state of New York to suspend all advertising that promoted electrical usage. In 1977, the Commission decided to make this ban a permanent fixture of its energy conservation policy in light of the growing energy crisis. Citing a legal history that commercial speech is still protected speech, Central Hudson Gas & Electric Corp. opposed this ban on First Amendment grounds.

The Supreme Court decided the case in June of 1980 and set up the, so-called, “three-prong” test that must be administered in appropriate commercial speech cases. Provided the speech is lawful and not misleading, the three prongs are as follows. First, does the government's program (in this case, the Commission's ban on advertising) involve a substantial government interest? Second, does the regulation directly advance that governmental interest? And, third, is the government's program narrowly tailored to minimize adverse impacts on First Amendment rights? Failure of any one of the three prongs of a *Central-Hudson* test means the



regulation is unconstitutional.<sup>19</sup>

### **First Amendment Challenges to Generic Advertising**

*Abood* and *Central Hudson* helped set the tone for a plethora of First Amendment cases destined to cause a re-examination of the speech (i.e., the advertising) and association components of marketing orders for generic advertising. A brief listing of certain rulings in a few of these cases is instructive. In the same year as *Abood*, the Supreme Court ruled that the government may not compel individuals to use their own property to endorse an ideological message with which they disagreed (*Wooley v. Maynard*). The Court strengthened this message by adding that the government may not force individuals to respond to a hostile message when they would prefer to remain silent (*Pacific Gas & Electric Co. v. Public Utilities Commission of California* in 1986). Nor may the government require an individual to be publicly identified or associated with another's message (*Pruneyard Shopping Center v. Robins* in 1980). In 1984, the Supreme Court ruled in *Roberts v. United States Jaycees* that the government's interference in one's freedom of association could only be justified by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."<sup>20</sup>

Beginning with *Abood*, the Supreme Court of the 1980s was signaling that it would observe governmental involvement in the First Amendment, especially governmental involvement in "commercial speech," with a great deal of scrutiny. It did not take long for opponents of marketing orders to take notice. With the *Abood* and *Central Hudson* cases to guide them, opponents of generic advertising argued, quite often convincingly, that their First

Amendment rights had been violated by the advertising campaigns that forced them to associate with their competitors and fund a promotional message with which they did not agree.

*United States v. Frame (1989)*

Throughout most of the 20<sup>th</sup> century, U.S. beef consumption had been steadily increasing. Annual beef demand reached its zenith in 1975 at around 90 pounds per person but in ten years demand had fallen to 1960s levels of around 70 pounds per person. In 1985, Congress amended the Beef Promotion and Research Act of 1976 to strengthen and expand a foundering beef market through the use of advertising and promotion. The newly amended act required cattle producers and importers to finance a national beef promotional campaign by paying an assessment of one dollar per head of cattle sold. L. Robert Frame, Sr., who operated a cattle auction sales business and raised cattle in Pennsylvania, refused to pay his assessments. The Secretary of Agriculture brought action against Frame, winning in the District Court. Frame appealed and the case was heard in the Court of Appeals for the 3<sup>rd</sup> Circuit in July of 1988. Frame argued that his First-Amendment rights of free speech and association had been violated by a generic advertising program that compelled him to associate with his competitors and pay for advertising when he would prefer to remain silent.<sup>21</sup>

In their 1989 ruling, the 3<sup>rd</sup> Circuit Court found that Frame's First Amendment rights had, in fact, been implicated by the forced association and the advertising. Nevertheless, this did not, in and of itself, justify nullifying the Beef Act. The rationale the Court used is insightful.

The government had argued that the promotion and advertising was "government speech" having been put forward by The Cattlemen's Board and Operating Committee, an instrument created by the Secretary of Agriculture to further the goals of the Act. ("Government speech" is

held to a much lower scrutiny than speech protected under the First Amendment.) Nevertheless, the Court rejected this argument and ruled that the beef promotion program, though compelled by the government, was, in fact a self-help, “commercial speech” program. Moreover, citing *Abood* and *Roberts*, the Court observed that this particular type of commercial speech had to be held to an even higher standard of scrutiny than other commercial speech cases because Frame was compelled to associate with the Cattlemen’s Board. Writing for the Court, Judge Scirica set forth the framework the Court would use to scrutinize the Act:

Accordingly, we will sustain the constitutionality of the Beef Promotion Act only if the government can demonstrate that the Act was adopted to serve compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms.<sup>22</sup>

The Court was impressed with several features of the Beef Act. First, that the act was put forward as a “self-help program” to insure the integrity of the independent cattlemen; second, that the promotion was ideologically neutral, and third, that the Act “expressly prohibits spending for political activity.” Again citing *Abood*, Judge Scirica wrote, “Frame has failed to characterize his objection to the advertisements in a manner that would allow a reviewing court to reasonably infer a dispute over anything more than mere strategy.” Interestingly, the Court noted that the Beef Act would pass the three-prong test of *Central Hudson* and those three prongs were, in fact, less restrictive than the *Abood* and *Roberts* tests used in *Frame*: the “*Central Hudson* test bolsters, rather than undermines, our conclusion that the Act is constitutional.” Thus, the 3<sup>rd</sup> Circuit Court rejected Frame’s free speech and association argument, finding that, although the Beef Promotion Act did implicate the First Amendment rights of those compelled to participate, clearly the government “enacted this legislation in furtherance of an ideologically neutral compelling state interest, and has drafted the Act in a way

that infringes on the contributors' rights no more than necessary to achieve the stated goal." Frame's appeal to the Supreme Court was denied.<sup>23</sup>

*Cal-Almond, Inc. v. U.S. Department of Agriculture (1993)*

Unlike beef, demand for almonds has been steadily increasing since the 1950s. Like other farm crops, producers respond to seasons of high prices by increasing plantings for future seasons. As almond orchards take an average of four years to become bearing, there tend to be cycles of booms and busts with an overall, long-run trend of falling almond prices, in real terms. The federal generic advertising marketing order for almonds, established in 1950, is an attempt to stimulate demand to handle the increased production. The almond advertising program differs from other such advertising marketing orders, however, in the provisions for collecting the advertising assessments. The almond order is administered by the Almond Board of California, which is composed of ten members from the industry. Assessments are collected when the grower brings his or her crop to an almond handler (processor), thus it is the handler who must actually collect the assessment and pay the Board. Many of the almond handlers are also growers themselves. The assessments are based upon volume and administered by the Board to cover Board activities such as research and development, quality control, volume regulation, and generic advertising and promotion. During the 1980s, handlers could be reimbursed in full for the generic advertising portion of the assessment, for consumer advertising of their own products provided that the advertising met requirements set by the Board.<sup>24</sup>

Some handlers felt that the Board requirements favored certain handlers, in particular the largest almond cooperative, Blue Diamond Almonds, over others. In 1987, when the first round of litigation in the *Cal-Almond* case began, Blue Diamond Almonds, the largest handler in the

industry, had a 92 percent share of almonds sold in grocery stores and sold almonds through its own retail stores. Most of the other almond handlers sold their almonds to food processors such as cereal makers. Also, because the almond marketing order allows for, what is termed, “bloc voting,” whereby an almond cooperative can vote on behalf of its grower members; the larger the cooperative, the votes it may cast. Through such voting, Blue Diamond, representing more than half of the growers in the industry, maintained a majority position on the Almond Board.<sup>25</sup>

In 1984, Saulsbury Orchards and Almond Processing, Inc. refused to pay its annual advertising assessments. Most of Saulsbury’s sales were to cereal manufacturers and Saulsbury helped fund advertisements for some of the almond-containing cereals. Saulsbury also provided almond-related advertising for a chain of mini-markets in the Boise, Idaho area that carried Saulsbury almonds. However, when Saulsbury tried to recoup its advertising expenditures for these venues, it was denied credit by the Board. The cereal expenditures were denied because of Board regulations that the advertised consumer product must contain at least fifty percent almonds in order for the advertising to be creditable. The mini-market advertising expenditures were unrecoverable because Board regulations denied credit for advertisements at retail outlets that were not operated by a handler. Another handler, Cal-Almond, Inc. sold most of its almonds to an ice cream manufacturer and helped advertise the ice cream. Cal-Almond was also denied credit for its advertising expenditures because the ice cream was less than fifty percent almond. Blue Diamond, on the other hand, was allowed to recoup its advertising expenditures. In 1987, Cal-Almond joined Saulsbury along with another handler, Carlson Farms, in challenging the almond order. The matter finally appeared before the 9<sup>th</sup> Circuit Court of Appeals in January 1993 as *Cal-Almond v. USDA*.<sup>26</sup>

The First Amendment attack on the almond order was similar to that in *Frame* in that the

appellants argued that the generic advertising program was an infringement on their First Amendment rights of free speech and association. The District Court, from which this case was appealed, had held that the almond marketing program neither implicated nor violated the appellants' First Amendment rights because no one was compelled to advertise and because handlers could get their assessments back if they participated in creditable advertising. The 9<sup>th</sup> Circuit Court disagreed with the lower court's reasoning, however, precisely because the Order does compel the handlers to expend money on assessments or creditable advertising, which, as the 3<sup>rd</sup> Circuit Court had found in *Frame*, burdened the handlers' First Amendment rights.

The 3<sup>rd</sup> Circuit Court had cited *Abood* and *Roberts* in arriving at its decision. The 9<sup>th</sup> Circuit Court, however, applied the three prongs of the *Central Hudson* test to the almond order's generic advertising program. For the first prong, the Court asked whether the governmental interest was substantial. The Court agreed with the language of the almond order in that stimulating demand for almonds so as to increase the returns to the almond industry was a substantial government interest. However, it balked at supporting the government in prongs two and three.

Recall, the second prong of the *Central Hudson* test asks whether the restrictions directly advance the government's interest. The Court first focused its attention on the creditable advertising restrictions and held that, to satisfy *Central Hudson*, the USDA must show that *i*) the advertising that received credit is better at stimulating demand for almonds than the Board's own advertising efforts, and *ii*) the advertising that is denied credit is worse than the Board's. In concluding that the generic promotion did not pass the second prong, the Court mainly relied on two observations. First, the USDA could provide no evidence or studies showing that the Board's advertising had any effect on almond demand. Thus, the USDA had no basis for

claiming that the generic advertising “directly advanced” the government’s interest. Second, the Court wondered whether handlers themselves could provide any evidence that the credit-back regulations helped them sell more almonds. Clearly Saulsbury’s and Cal-Almond’s experience suggested otherwise. However, even the largest handler could provide no evidence that the regulations helped. Roger Baccigaluppi, Blue Diamond’s president and chief executive officer, testified that Blue Diamond would “probably” continue to spend just as much money advertising even if the regulations did not exist, and Walter Payne, Blue Diamond’s vice president for sales, marketing and distribution, testified that Blue Diamond would advertise the same amount and in the same manner in the absence of the credit regulations. In the 9<sup>th</sup> Circuit Court’s ruling, Judge Brunetti summarized “the regulations do not ‘directly advance’ the government’s asserted interest in increased almond sales and are therefore an unconstitutional restriction on appellants’ First Amendment rights.”<sup>27</sup>

The Court now turned to the third and final prong of *Central Hudson*: are the regulations more extensive than necessary to further the government’s interest in selling almonds? The Court agreed with the general notion that advertisements for which credit is permitted will increase almond sales, but chided the USDA for offering no justifications for the restrictions that denied credit. The USDA had argued that “the regulations reflect a reasonable judgement that the Board will make better use of those monies in its market promotion programs” than could be made by the handlers in their non-creditable advertising expenditures. Again, Judge Brunetti writes,

It is true that the fit between means and ends need not be perfect, but there seems to be no logical justification for these types of restrictions other than the restrictions are designed to benefit Blue Diamond, who overwhelmingly dominates the retail almond market, at the expense of smaller handlers such as appellants, who sell primarily to ingredient manufacturers. . . . The creditable advertising regulations . . . are more extensive than necessary to serve the interest

of increasing almond sales.

Having failed on two of the three prongs of *Central Hudson*, the 9<sup>th</sup> Circuit Court ruled that the advertising portion of the almond order was an unconstitutional violation of the appellants' First Amendment rights.<sup>28</sup>

### **The Fallout from *Frame* and *Cal-Almond***

Following years of stability, marketing orders were now facing a real Constitutional threat. In the years to come dozens of challenges would arise. Some of the programs (the vast majority of which were in California, and under the jurisdiction of the 9<sup>th</sup> Circuit) that subsequently came under attack were the California Apple Commission, the California Cling Peach Growers Advisory Board, the California Cut Flower Commission, the California Grape Rootstock Improvement Commission, the California Kiwifruit Commission, the California Milk Advisory Board, the California Plum Marketing Board, the California Table Grape Commission, the Cattleman's Beef Board, Marketing Orders 916 and 917 (California peaches, plums and nectarines), the Mushroom Council, and Promo-Flor (a national floral group). Some would succeed, others would not. Court opinions from circuit to circuit showed seeming disagreement on the application of *Abood*, *Central Hudson*, and related Supreme Court decisions (see, for example, *Goetz v. Glickman*). There is little need to present these cases except to note that confusion among interested parties was growing. The 3<sup>rd</sup> Circuit in *Frame* and the 9<sup>th</sup> Circuit in *Cal-Almond* had proffered different conclusions on very similar programs and there was no clear indication of which ruling would be applied by district judges. Sooner or later, the U.S. Supreme Court would have to get involved.<sup>29</sup>



*Glickman v. Wileman (1997)*

In February of 1995, two years after its decision in *Cal-Almond*, the 9<sup>th</sup> Circuit heard a similar argument from sixteen handlers of California nectarines, peaches and plums. The tree-fruit case began as a dispute over size and quality regulations in the marketing orders. The case had wound its way through the courts of an Administrative Law Judge, who ruled in favor of the handlers; a USDA Judicial Officer, ruling in favor of the Secretary of Agriculture, and a District Court that also sided with the Secretary. Adding a First Amendment argument, the handlers appealed the District Court's ruling to the 9<sup>th</sup> Circuit (*Wileman Bros. & Elliott, Inc. v. Espy*; later renamed *Wileman Bros. & Elliott, Inc. v. Glickman*). Like the handlers in *Cal-Almond*, the tree-fruit handlers in *Glickman* objected to the generic advertising assessments on First Amendment grounds. The case differed somewhat from the *Cal-Almond* case in that the tree-fruit marketing order did not allow for creditable advertising for the handlers' own promotion campaigns. Still, many of the same arguments heard in *Cal-Almond* were also made here. In particular, there was the charge that certain generic advertisements favored products distributed by some handlers over others. For example, the handlers argued that certain generic ads put forward the message that "red is better" and cited a promotional chart, financed by the assessments, that listed a proprietary variety of nectarine, the "Red Jim," which was owned by a member of the Nectarine Administrative Committee.<sup>30</sup>

The 9<sup>th</sup> Circuit Court used its own standard as laid out in *Cal-Almond* and applied the three prongs of *Central Hudson* to the *Glickman* case. On the first prong, the 9<sup>th</sup> Circuit Court found that the government did have a substantial government interest in enhancing tree-fruit grower returns: "The handlers point to no reason why the government's interest in promoting peaches and nectarines is any less substantial than it is for almonds." On the second prong, the

Court agreed with the Secretary's claim that generic advertising had increased sales, "However, according to *Cal-Almond*, the question is not whether the generic advertising program has increased peach and nectarine sales—it undoubtedly has. Rather, the question is whether the mandatory generic advertising program sells the product more effectively than the 'specific, targeted marketing efforts of individual handlers.'" The 9<sup>th</sup> Circuit ruled that there was no evidence that the tree-fruit generic program was better at increasing demand than individual handler advertising, and, therefore, the generic program failed the second prong of *Central Hudson*. Third, the 9<sup>th</sup> Circuit concluded that the tree-fruit marketing orders for generic advertising were more restrictive than that of the almond order (because the tree-fruit orders lacked a credit-back provision for individual advertising). Thus, because the less restrictive almond order had failed the third prong of *Central Hudson* (i.e., it was not sufficiently narrowly tailored) the orders for tree fruits also failed this prong. Having failed two of the three prongs, the generic promotion aspect of the tree-fruit orders, like that of the almond order, was ruled an unconstitutional infringement on the handlers' rights of free speech and association.<sup>31</sup>

The Secretary of Agriculture appealed the 9<sup>th</sup> Circuit's ruling to the U.S. Supreme Court on the grounds that the 9<sup>th</sup> Circuit's First Amendment decision in *Glickman* was in conflict with the 3<sup>rd</sup> Circuit's decision in *Frame*. The Supreme Court granted the Secretary's petition and heard testimony in December 1996 (*Glickman, Secretary of Agriculture v. Wileman Brothers & Elliott, Inc. et al.*). The Supreme Court's decision is well known: in a 5-4 ruling, it reversed the 9<sup>th</sup> Circuit. In its decision, the Court put forward two main findings. First, the handler's disagreement with the content of some of the advertising had no bearing on the validity of the entire generic program. Second, the 9<sup>th</sup> Circuit had erred in using *Central Hudson* to test the constitutionality of the program.<sup>32</sup>

Writing for the Court, Justice Stevens repeatedly stressed the statutory context within which the generic promotion program had arisen and that the generic campaigns had to be viewed in light of the regulatory scheme that Congress had put forward.

The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.

In answering that question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme.

The Court then pointed out that there were three characteristics of the generic advertising orders' regulatory scheme that distinguished the orders from other laws that had been found to violate the First Amendment. First, the marketing orders do not prevent producers from communicating any message to any audience, a fact that distinguishes this case from the *Central Hudson* case. Second, the marketing orders do not compel the handlers to engage in any actual or symbolic speech. Third, the marketing orders do not compel the handlers to endorse or to finance any political or ideological views, which also distinguishes this case from that of *Abood*. "Thus," Justice Stevens writes, "none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard from that applicable to the other anticompetitive features of the marketing orders."<sup>33</sup>

The Court stressed that the regulatory nature of the marketing orders necessitated that the generic advertising be judged in a different light from that of other commercial speech cases. Congress had made a regulatory decision that, right or wrong, certain commodities should be marketed jointly.

The basic policy decision that underlies the entire statute rests on an assumption that in the volatile markets for agricultural commodities the public will be best served by compelling cooperation among producers in making economic decisions that would be made independently in a free market. It is illogical, therefore, to criticize any cooperative program authorized by this statute on the ground that competition would provide greater benefits than joint action.

Thus, the 9<sup>th</sup> Circuit Court's application of the three prongs of *Central Hudson*, especially that Court's requirement that the Secretary prove that demand had been increased more effectively by generic advertising than it would have been by the marketing efforts of independent producers, was "inconsistent with the very nature and purpose of the collective action program."<sup>34</sup>

The Supreme Court did note the similarity with *Abood* and subsequent cases in that these cases showed that "assessments to fund a lawful collective program may sometimes be used for speech over the objection of some members of the group." Recall, the *Abood* test merely requires *i*) that the assessments be spent on promotion relevant to the statutory goals, and *ii*) that participants not be compelled to fund non-relevant, ideological speech. The Court found that the tree-fruit orders satisfied both of these requirements. Under *Central Hudson*, the 9<sup>th</sup> Circuit Court had ruled that the generic advertising had passed the first prong (the government had a substantial interest in increasing demand). With an *Abood* test, however, the Supreme Court indicated that the government need not show even this: the government's legislative action alone was enough to satisfy the necessity of the program. Simply, as long as the regulatory means furthered the goals of the acts and did not compel ideological speech, that was all that was necessary to satisfy the acts' constitutionality. The question of whether individual handlers were hurt was not under consideration since they had chosen to operate in a regulated environment in the first place.

In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgements made by Congress. The mere fact that one or more producers "do not

wish to foster” generic advertising of their product is not a sufficient reason for overriding the judgement of the majority of the market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.<sup>35</sup>

### *Souter’s Dissent*

After the ruling was handed down, Jim Moody, a Washington, D.C. attorney who has challenged several marketing orders, said that the ruling was “a narrow holding with four solid votes for trashing the program. It will increase the litigation. It does not end it. Is the fight over? No, it just got worse.” The majority in *Glickman* were Justices Stevens, O’Connor, Kennedy, Ginsburg, and Breyer. The dissenters were Souter, Rehnquist, Scalia, and Thomas. Of course, the majority rules in Supreme Court cases, yet insights can be gleaned from the dissent written by Justice Souter.<sup>36</sup>

In writing his dissenting opinion, Justice Souter made two main points. First, he felt the Court had misread the *Abood* decision. The Court was mistaken in “treating *Abood* as permitting any enforced subsidy for speech that is germane to permissible economic regulation, in the sense that it relates to the subject matter of the regulation and tends to further its objectives.” In Justice Souter’s opinion the tree-fruit orders did not further any vital policy interests since the Agricultural Marketing Agreement Act’s “authorization of compelled advertising programs is so random and so randomly implemented, in light of the Act’s stated purposes, as to unsettle any inference that the Government’s asserted interest is either substantial or even real.” Justice Souter not only finds an arbitrariness in the commodities covered, but also, the geographical regions covered by various orders, for instance California peaches but not Georgia peaches.<sup>37</sup>

Second, Justice Souter argues that the Court had misapplied the *Abood* test when the correct test was, in his opinion, the *Central Hudson* test. Unlike the 9<sup>th</sup> Circuit, however, in light

of the arbitrariness of the orders, Justice Souter argues that the First Amendment validity of the tree-fruit acts would have fallen under all three prongs. Nevertheless, Justice Souter does say that, under *Central Hudson*, “the Government’s obligation is not a heavy one”, and that, although he would have affirmed the 9<sup>th</sup> Circuit in this case, the generic advertising could stand a constitutional test provided the Secretary could demonstrate three things. First, under prong one, the Secretary must provide compelling evidence that the advertising supports a substantial government interest. In light of what Justice Souter saw as an arbitrariness in the construction of the orders, it would help if an order were based on one particular commodity, not that of a particular state. Second, under prong two, the Secretary must demonstrate how the compelled advertising advances that interest by either showing “that its mandatory scheme appreciably increases the total amount of advertising for a commodity or somehow does a better job of sparking the right level of consumer demand than a wholly voluntary system would.” Finally, to satisfy the third prong, the Secretary must demonstrate that the generic advertising is narrowly tailored to achieving the government’s interest. Interestingly, Justice Souter argues that a simple way of doing this is to allow a credit-back program for branded advertising (recall, the tree-fruit orders do not have such a system). Thus, in light of Justice Souter’s writing, Mr. Moody’s statement above that the dissent represented “four solid votes for trashing the program” may be hasty. Justice Souter’s dissent seems to imply that there were four solid votes for “altering” the program, but certainly not for simply “trashing” it. Justice Souter’s dissent is not a stinging denunciation of generic advertising: it is a stinging denunciation of the majority’s application of *Abood* over *Central Hudson*. Given the three tests Justice Souter lays out in his dissent, had this opinion been that of the majority, clearly marketing boards today would be scrambling to justify generic advertising, but the decision would not have ended the programs outright.<sup>38</sup>

Rulings in all of the pending First Amendment marketing-order challenges had been postponed until the Supreme Court's ruling in *Glickman*. After the Supreme Court's decision, appellants in other cases tried to argue that the marketing orders in those cases were, in some sense, different from the tree-fruit orders. For example, the handlers in *Cal-Almond* contended that *Glickman* did not apply because the credit-back assessment mechanism of the almond order was different than that of the tree-fruit orders. In light of *Glickman*, the 9<sup>th</sup> Circuit rejected this argument, reversing its previous ruling in *Cal-Almond*. Since *Glickman*, in all of the cases that had been put on hold pending the Supreme Court decision, every federal appeals court has applied *Glickman* to uphold the constitutionality of the promotion programs. . . except one.

**Here we go again.**

In November of 1999, the 6<sup>th</sup> Circuit Court of Appeals ruled that the Mushroom Promotion Act of 1990 was unconstitutional because the act that created it was not in the same spirit as the broader, collective regulation embodied in the 1937 Act. The Mushroom Promotion Act, like the Beef Act in *Frame*, is termed a “stand-alone” program, as it was not formed under the original 1937 Act. However, given that the Supreme Court saw no distinction between the stand-alone promotion program in the Beef Act and the promotion program in the tree-fruit orders, the 6<sup>th</sup> Circuit's ruling surprised many on both sides of the marketing order debate.<sup>39</sup>

United Foods, Inc., a Tennessee food processor, challenged the 1990 Mushroom Act on the grounds that the assessments were compelled, commercial speech and that the mushroom industry differed from that of the tree-fruit industry in the *Glickman* case. A U.S. District Judge for Western Tennessee had ruled against United Foods citing the *Glickman* decision and United Foods appealed.

Attorneys for United Foods used a very interesting argument in order to distinguish the mushroom industry from the tree-fruit industry in *Glickman*. Focusing on the language of Justice Stevens' opinion concerning regulation and compelled association, they emphasized that the regulatory environment that justified the tree-fruit order was almost completely absent in the mushroom industry. Further, they argued that tree fruits need a generic program because the grading and standards regulations that are also part of the tree fruit orders fostered product homogeneity. Mushrooms, on the other hand, are not subject to such grading regulations and truly are heterogeneous, so a generic program provides no real benefit as “mushroom producers can freely differentiate their product and stimulate demand through individual competitive advertising.”<sup>40</sup>

The government argued that *Glickman* was not based on the degree of regulation in an industry, but the 6<sup>th</sup> Circuit found the limited-regulation argument persuasive. Citing that the regulatory nature of the mushroom program was inherently different from that of the tree-fruit agreements, the 6<sup>th</sup> Circuit ruled that the Mushroom Act was unconstitutional.

Considering that the 6<sup>th</sup> Circuit's ruling may limit the *Glickman* decision, it is surprising how brief the opinion is. Covering barely three pages in the Federal Register, the kernel of Judge Merritt's opinion is that “The Court's holding in *Glickman*, we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise.” Therefore, without the extensive regulation as present in the tree-fruit marketing orders, there is no justification for any further limits on compelled speech.<sup>41</sup>

Arguing that the 6<sup>th</sup> Circuit Court's ruling was in conflict with the US Supreme Court's ruling in the *Glickman* case, the government appealed. The US Supreme Court agreed to hear



the case and, in a 6-3 decision, on June 25, 2001 upheld the 6<sup>th</sup> Circuit Court's ruling. Writing for the majority, Justice Kennedy stated, "The program sustained in *Glickman* differs from the one under review in a most fundamental respect. In *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing autonomy. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme." Because of this, the Court could not uphold "compelled subsidies for speech in the context of a program where the principal object is speech itself." In other words, as long as the generic advertising is part of a broader, regulatory scheme (like the marketing orders for tree fruit), the assessments would pass Constitutional muster, but if the generic advertising were the primary purpose for the collecting of assessments, the assessments then violated the First Amendment.<sup>42</sup>

Although the Court left a great deal of room in determining what is or is not "a broader regulatory scheme" it is important to note exactly how Justice Kennedy and the majority viewed the mushroom market as different from the tree-fruit market. "Beyond the collection and disbursement of advertising funds, there are no marketing orders that regulate how mushrooms may be produced and sold, no exemption from the antitrust laws, and nothing preventing individual producers from making their own marketing decisions." Neither has the mushroom market been "subjected to a uniform price, or otherwise subsidized through price supports or restrictions on supply." For both opponents and supporters of generic advertising programs, these distinctions should be noted carefully. It would seem that almonds, which also have supply controls as part of its marketing order, would certainly pass the *United Foods* test, but what about beef or pork or cotton? Although the Supreme Court had earlier declined to hear the *Frame* case, it is not clear that a future Court might do so, as *Frame* did not address the overall

degree of regulation in the beef industry. In fact, most state-authorized orders and commissions exist primarily to fund collective research and promotion without additional industry collectivization or other regulations (Lee *et al.* identified 36 such state-authorized promotion programs in California alone).<sup>43</sup>

Given the contentious history of marketing orders for generic advertising, the animosity that has grown among both producers and processors who are affected by these orders will likely increase as well. This paper shows that these cases did not simply arise from either free-riding growers or over-zealous lawyers, though both of these beliefs are widely held. With the benefit of hindsight, it is clear that fairly recent Supreme Court decisions concerning commercial speech implicated the generic advertising programs. For the majority on the bench in *Glickman*, that which distinguished generic advertising's compelled speech from that of other First Amendment cases was the regulatory attempt at alleviating "the farm problem." Given the evolution of the court cases presented here, the natural question to ask after *Glickman* was, "How much regulation is needed?" The Court's response came with the ruling in *United Foods*. However, as the Court did not set out a specific formula to determine the degree of regulation, one should expect a substantial increase in challenges to other advertising programs. As in the earliest arguments over farmer cooperatives, once again we find that an attempt to alleviate the farm problem is contingent on the degree to which farmers wish to act collectively.

## Notes

<sup>1</sup> *Glickman, Secretary of Agriculture v. Wileman Brothers & Elliott, Inc. et al.*, 521 U.S. (1997). *United Foods, Inc. v. United States of America*, 197 F.3d, 6<sup>th</sup> Cir. (1999): 221. Houston quoted by Harry Cline, *California Farm Press*, “U.S. Supreme Court Agrees to Hear Market Order Case,” July 6, 1996: 4. A recent study by John M. Crespi and Richard J. Sexton, “Have Expenditures to Advertise California Almonds Been Effective?” *Agricultural and Resource Economics Update*, 3(Winter 2000), University of California, Davis: 8, estimated the cost to the industry of the litigation-related, four-year suspension of the generic advertising program for almonds to range from 90 to 230 million dollars. *United States of America v. United Foods, Inc.*, 00-276.

<sup>2</sup> Len Richardson, “What’s Supreme?” *California Farmer*, January 1997: 5. Brian C. Leighton, “Brian’s Song,” *California Farmer*, February 1997: 4.

<sup>3</sup> The Agricultural Marketing and Agreement Act of 1937, 7 U.S.C. § 601 *et seq.*

<sup>4</sup> *Wileman*, oral arguments. Ronald D. Knutson, J.B. Penn, and Barry L. Flinchbaugh, *Agricultural and Food Policy*, Fourth Ed., Prentice Hall, Upper Saddle River, New Jersey, 1998: 33-35.

<sup>5</sup> Victoria Saker Woeste, *The Farmer’s Benevolent Trust: Law and Agricultural Cooperation in Industrial America, 1865-1945*. The University of North Carolina Press, Chapel Hill, North Carolina, 1998: 17-36. Economic Research Service, *A History of American Agriculture, 1607-2000*, USDA, Washington D.C., 2000.

<sup>6</sup> Woeste, *The Farmer’s Benevolent Trust*: 30. Herbert Hovenkamp, *Enterprise and American Law*, Harvard University Press, Cambridge, Massachusetts, 1991: 301-304, documents how support among economists for “trusts” also began growing at the turn of the century, though much of this support had eroded by the 1920s. Jeremiah W. Jenks, “Trusts in the United States,” *The Economic Journal* 2(1892):70-99.

<sup>7</sup> Woeste, *The Farmer’s Benevolent Trust*: 93-107. Knutson, Penn and Flinchbaugh, *Agricultural and Food Policy*: 246.

<sup>8</sup> Woeste, *The Farmer’s Benevolent Trust*: 216-223.

<sup>9</sup> Harold F. Breimyer, “Conceptualization and Climate for New Deal Farm Laws of the 1930s,” *American Journal of Agricultural Economics* 65(1983): 1153-57. Mordecai Ezekiel and Louis H. Bean, *Economic Bases for the Agricultural Adjustment Act*, United States Department of Agriculture, Washington, D.C., December 1933. Kenneth R. Farrell and C. Ford Runge, “Institutional Innovation and Technical Change in American Agriculture: The Role of the New Deal,” *American Journal of Agricultural Economics* 65(1983): 1168-73. Olan D. Forker and Ronald W. Ward, *Commodity Advertising: The Economics and Measurement of Generic Programs*, Lexington Books, New York, 1993: 78-80. Don Paarlberg, “Effects of New Deal Farm Programs on the Agricultural Agenda a Half Century Later and Prospect for the Future,” *American Journal of Agricultural Economics* 65(1983): 1163-67.

<sup>10</sup> Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933*, Harvard University Press, Cambridge, Massachusetts, 1990: 157. Woeste, *The Farmer’s Benevolent Trust*: 230.

<sup>11</sup> Woeste, *The Farmer’s Benevolent Trust*: 230. Peter H. Iron, *The New Deal Lawyers*, Princeton University Press, Princeton, NJ, 1982: 112. For sake of brevity, I have left out much discussion on the formation of the AAA, but the interested reader is also referred to Iron’s discussion in chapter 6, which shows that both the farmers themselves and the lawyers working on the AAA were hardly unanimous in the type of programs to put into place. See also the discussion in this journal of the New Deal agricultural policy reformers: Jess Gilbert, “Eastern Urban Liberals and Midwestern Agrarian Intellectuals,” *Agricultural History*, 74(2000): 162-180. See also the discussion in Neil E. Harl, *Agricultural Law*, Volume 9, Chapter 70, Matthew Bender & Company, Inc., New York, 1999. *Panama Refining Co. v. Ryan*, 293 U.S. (1935): 388. *Schechter v. United States*, 295 U.S. (1935): 495. Robert Paarlberg and Don Paarlberg, “Agricultural Policy in the Twentieth Century,” *Agricultural History* 74(2000):136-161.

<sup>12</sup> *United States v. Butler*, 297 U.S. (1936): 1. *United States v. David Buthick Co.*, 15 F. Supp., Dist. of Mass. (1936): 655. Much has been written on the evolution of the AAA, the interested reader is especially referred to chapters 6 through 8 in Iron, *The New Deal Lawyers*.

<sup>13</sup> This voting provision is often neglected in press accounts, leading some to believe that marketing orders are simply imposed on growers by the government. For example, a fifteen-paragraph, *Wall Street Journal* article by Edward Felsenthal (November 26, 1996: B1) entitled, “Should Government Market Pork and Peaches?” mentions neither the original grower referenda that started the programs nor the subsequent grower votes that keep them running.

<sup>14</sup> *United States v. Rock Royal CO-OP., Inc.*, 307 U.S. (1939): 533.

<sup>15</sup> *United States v. Rock Royal CO-OP., Inc.*: 569.

<sup>16</sup> *United States v. Mills*, 315 F.2d 828, 4<sup>th</sup> Cir. (1963). *Freeman v. Hygeria Dairy Co.*, 326 F.2d, 5<sup>th</sup> Cir. (1964):

271. *Consolidated-Tomoka Land Co. v. Butz*, 498 F.2d, 5<sup>th</sup> Cir. (1974): 1208. *Sequoia Orange Co. v. Yeutter*, 973 F.2d, 9<sup>th</sup> Cir. (1992): 752. *Cecelia Packing v. U.S. Dept. of Agriculture*, 10 F.3d, 9<sup>th</sup> Cir. (1993): 616. *Carnation Co. v. Butz*, 372 F. Supp. Dist. of D.C. (1974): 883. *Abbotts Dairies Div. of Fairmont Foods, Inc. v. Butz*, 389 F. Supp., E. Dist. Penn. (1975): 1.

<sup>17</sup> *The Agricultural Act of 1954*, 7 U.S.C. §401(c). Knutson, Penn and Flinchbaugh, *Agricultural and Food Policy*: 329-30.

<sup>18</sup> *Abood v. Detroit Board of Education*, 431 U.S. (1977): 209.

<sup>19</sup> In the *Central Hudson* case, the Court found that only the first two prongs were satisfied. *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. (1980): 557.

<sup>20</sup> *Wooley v. Maynard*, 430 U.S. (1977): 705. *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. (1986): 1, 18. *Pruneyard Shopping Center v. Robins*, 447 U.S. (1980): 74, 88. Justice Brennan, *Roberts v. United States Jaycees*, 486 U.S. (1984): 623.

<sup>21</sup> Current beef demand is a little over 60 pounds per person, *FoodReview*, USDA, Economic Research Service, 23(2000): 11. The Beef Promotion and Research Act is not part of the 1937 Agricultural Marketing and Agreement Act, which covered the dairy, fruits and vegetables industries. The Beef Act is termed a “stand alone” marketing program. Nevertheless, the administration, promotion and assessment aspects of such stand-alone programs are nearly identical to those of the marketing orders. *Frame, L. Robert, Sr., et al. v. United States*, 885 F.2d. (1988): 1119.

<sup>22</sup> *Frame v. United States*: 1134.

<sup>23</sup> *Frame v. United States*: 1135-1137. *Frame v. United States*, 110 U.S. (1990): 1168.

<sup>24</sup> *Alston et al. Optimal Reserve and Export Policies for the California Almond Industry*, Giannini Foundation Monograph Number 42, Davis, California, February 1995.

<sup>25</sup> Market share figures come from *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d, 9<sup>th</sup> Cir. (1993): 429, footnote 9. An interesting and related anecdote to the perception of who benefits from generic advertising concerns the January 2001 vote by a majority of pork producers to abolish its generic advertising program. The pork producers who voted away the program believed that disparities in producer output caused the producer-funded program to benefit larger producers. The litigation twist to the pork case is that several of the larger producers may challenge the vote in court on the basis that the one-producer, one-vote rule is unfair because it *fails* to take size into account.

<sup>26</sup> *Saulsbury Orchards and Almond Processing, Inc. v. Yeutter*, 917 F.2d, 9<sup>th</sup> Circuit, (1990): 1190, 1193. *Cal-Almond, Inc. v. U.S. Dept. of Agriculture*, 14 F.3d, 9<sup>th</sup> Cir. (1993): 429.

<sup>27</sup> *Cal-Almond, Inc.*: 439.

<sup>28</sup> *Cal-Almond, Inc.*: 440.

<sup>29</sup> *Goetz v. Glickman*, C.A. No 94-1299-FGT, Dist. of Kansas (1996).

<sup>30</sup> *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d, 9<sup>th</sup> Cir. (1995): 1367, 1377, footnote 6.

<sup>31</sup> *Wileman Bros. & Elliott, Inc. v. Espy*: 439.

<sup>32</sup> Petition granted in 517 U.S. 1232. *Glickman, Secretary of Agriculture v. Wileman Brothers & Elliott, Inc. et al.*, 521 U.S. (1996): 457. It is also important to note that the Supreme Court felt inclined to rule on what was seen as a contradiction between the 9<sup>th</sup> Circuit’s *Wileman* ruling and the 3<sup>rd</sup> Circuit’s *Frame* ruling. After the Supreme Court’s *Wileman* decision, some attorneys argued that *Wileman* had no bearing on stand-alone programs (like the Beef Act and the Mushroom Promotion Act). Clearly, the Supreme Court did not view the First Amendment issues involved in stand-alone programs as distinct from those in marketing orders.

<sup>33</sup> *Glickman v. Wileman*: 468-70. See also Stephen Breyer, *Regulation and Its Reform*, Harvard University Press, Cambridge, Massachusetts, 1982: 156-161.

<sup>34</sup> *Glickman v. Wileman*: 474-75.

<sup>35</sup> *Glickman v. Wileman*: 472 and 477.

<sup>36</sup> Moody’s quote appears in Michael Doyle, “Court OKs Grower Ad Payments,” *The Sacramento Bee*, June 26, 1997: E1.

<sup>37</sup> *Glickman v. Wileman*: 497-98.

<sup>38</sup> *Glickman v. Wileman*: 498, 501-04. Also, recalling that the almond order does have a credit-back system, it would be interesting to hear Justice Souter’s opinion on *Cal-Almond*. Conceivably, since all U.S. almonds are grown in California, and the Order has a credit-back provision, the only prong it might fail on is prong two.

<sup>39</sup> *United Foods, Inc. v. United States of America*, 197 F.3d, 6<sup>th</sup> Cir. (1999): 221.

<sup>40</sup> The author is grateful to Bradley A. MacLean of the Nashville firm of Farris, Warfield & Kanaday, PLC for providing me with excerpts from the brief.

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<sup>41</sup> *United Foods, Inc. v. United States of America*, 197 F. 3d: 224.

<sup>42</sup> *United States et al. v. United Foods, Inc.*, 533 U.S. \_\_\_\_\_ (2001).

<sup>43</sup> *United States et al. v. United Foods, Inc.*, 533 U.S. 6. Lee, H., J.M. Alston, H.F. Carman, and W. Sutton.  
“Mandated Marketing Programs for California Commodities,” Giannini Foundation Information Series N. 96-1,  
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